The Bank of East Asia Ltd Singapore Branch v Axis Incorporation Bhd (No 2)

HIGH COURT (JOHOR BAHRU) — COMPANY WINDING UP NO (MT-1) 28–1 OF 2009
VERNON ONG JC
7 JULY 2009

Civil Procedure — Striking out — Winding up petition under s 218 of the Companies Act 1965 — Whether winding up proceedings could be instituted based on Singaporean judgment not registered in Malaysia — Whether winding up proceedings an execution proceedings or an action to recover judgment sum — Reciprocal Enforcement of Judgments Act 1958 s 7 — Companies Act 1965 ss 176(10) & 218 — Rules of the High Court 1980 O 19 r 19(1), O 45 & O 92 r 4

Companies and Corporations — Winding up — Petition under s 218 — Inability to pay debts — Application to strike out petition as abuse of process of court — Whether winding up proceedings could be instituted based on Singaporean judgment not registered in Malaysia — Whether winding up proceedings an execution proceedings or an action to recover judgment sum — Reciprocal Enforcement of Judgments Act 1958 s 7 — Companies Act 1965 ss 176(10) & 218 — Rules of the High Court 1980 O 19 r 19(1), O 45 & O 92 r 4

Words and Phrases — 'Proceedings', meaning of — Whether word 'proceedings' in s 7 of the Reciprocal Enforcement of Judgments Act 1956 included presentation of winding up petition — Reciprocal Enforcement of Judgments Act 1958 s 7 — Companies Act 1965 ss 176(10) & 218

The petitioner had obtained a judgment in default of appearance against the respondent, a public listed company, for US$2,422,273.23 together with interest and costs in the High Court of Singapore. The petitioner then presented a winding up petition ('the petition') under s 218 of the Companies Act 1965 ('the Act') against the respondent, on the grounds that the latter was unable to pay its debts. The petitioner also obtained an ex parte order to appoint a provisional liquidator ('the ex parte order'). Both the ex parte order and the petition were thereafter served on the respondent. The respondent's application to set aside the ex parte order and remove the provisional

liquidator was granted. The respondent thereafter applied by way of this notice of motion to strike out the petition under O 18 r 19(1)(d) of the Rules of the High Court 1980 ('the RHC') as an abuse of process of the court. It was the respondent's submission that the Reciprocal Enforcement of Judgments Act 1958 ('REJA') applied to Singapore because it is a reciprocating country and that under s 7 of the REJA, which applied to all proceedings for the recovery of a sum payable under a foreign judgment, the winding up proceedings could not be instituted against the respondent without first registering the foreign judgment in Malaysia. As such, the respondent contended that the petition, which was premised upon a Singaporean judgment and which was in violation of the express statutory provisions of s 7 of the REJA, was manifestly unsustainable and should be struck out. The respondent further submitted that the court had struck out the ex parte order on the same grounds, ie that the petitioner had failed to register the foreign judgment under REJA. The petitioner on the other hand, raised the preliminary objection that the notice of motion was an abuse of process of the court because it raised issues that should be raised at the hearing of the petition. The petitioner also submitted that a winding up proceeding was not an execution proceeding or an action to recover a judgment sum and that therefore the issue of a foreign judgment had no relevance to these proceedings. The main issue to be determined by the court was whether the word 'proceedings' in s 7 of the REJA included the presentation of a winding up petition.

Held, striking out the petition with costs:

(1) As the court had the power to strike out a winding up petition under O 18 r 19 of the RHC and under the inherent powers of the court under O 92 r 4 of the RHC where the petition is unsustainable or an abuse of the process of the court the petitioner's preliminary objection that the respondent's application was an abuse of process as the issues raised should be raised at the hearing of the petition is unsustainable (see para 14).

(2) The petition in the present case was founded on a judgment in default obtained in the High Court of Singapore. As Singapore is a reciprocating country under the First Schedule of the REJA, the judgment is one that can be registered. Pursuant to s 7 of the REJA, no proceedings for the recovery of a foreign judgment should be entertained until the registration of the said judgment. However, there was no evidence to show that the petitioner had taken any steps to register the Singaporean judgment in Malaysia. Be that as it may, it was

necessary to ascertain whether s 7 of the REJA would apply to the instant case for only then must the Singaporean judgment be registered (see paras 15 & 16). A

(3) The word 'proceedings' is defined in the Companies (Winding-Up) Rules 1972 as the proceedings in the winding up of a company under the Act and such proceedings commence upon the presentation of a winding up petition. In the present case, as the petition was made upon a statutory demand for a judgment debt the winding up proceedings were made with the view of recovering the judgment debt. This is so even though it is not an enforcement within the meaning of O 45 of the RHC. Further, the court's power to restrain proceedings under s 176(10) of the Act included a restraint on winding up proceedings. Accordingly, the meaning of the word 'proceedings' in s 7 of the REJA is non-exhaustive and includes proceedings in any action or matter including winding up proceedings. By REJA, the Parliament was intending to provide that the only method of enforcing foreign judgments should be by registration. Thus in the present case, the registration of the Singaporean judgment was a fundamental prerequisite without which the petitioner was devoid of the requisite right to take any proceedings on the judgment. In the circumstances, the petition was premature and bad in law and as such an abuse of process (see paras 19, 21 – 22 & 25). B C D E

[Bahasa Malaysia summary

F

Pempetisyen telah mendapatkan penghakiman ingkar kehadiran terhadap responden, sebuah syarikat senaraian awam, untuk US$2,422,273.23 bersama dengan faedah dan kos di Mahkamah Tinggi Singapura. Pempetisyen kemudiannya mengemukakan petisyen penggulungan ('petisyen') di bawah s 218 Akta Syarikat 1965 ('Akta') terhadap responden, atas dasar bahawa responden tidak dapat membayar hutang-hutangnya. Pempetisyen juga mendapatkan perintah ex parte untuk melantik seorang likuidator sementara ('perintah ex parte'). Kedua-dua perintah ex parte dan petisyen kemudiannya disampaikan kepada responden. Permohonan responden untuk mengetepikan perintah ex parte dan likuidator sementara diberikan. Responden kemudiannya memohon melalui notis usul untuk membatalkan petisyen tersebut di bawah A 18 k 19(1)(d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sebagai penyalahgunaan proses mahkamah. Adalah menjadi hujahan responden bahawa Akta Penguatkuasa Salingan Hukuman 1956 ('APSH') digunapakai di Singapura kerana ia merupakan negara salingan dan bahawa di bawah s 7 APSH, ianya diguna pakai dalam kesemua prosiding untuk mendapatkan jumlah yang perlu dibayar di bawah penghakiman asing, maka prosiding penggulungan tidak boleh dimulakan terhadap responden tanpa mendaftarkan penghakiman G H I

A asing terlebih dahulu di Malaysia. Oleh itu, responden menghujah bahawa petisyen tersebut, yang dipremiskan di atas penghakiman Singapura dan dalam pelanggaran peruntukan statutori tersurat s 7 APSH, tidak dapat dikekalkan dan sepatutnya dibatalkan. Responden kemudiannya menghujah bahawa mahkamah telah membatalkan perintah ex parte atas asas yang sama,
B bahawa pempetisyen gagal untuk mendaftarkan penghakiman asing di bawah APSH. Pempetisyen, mengemukakan bantahan permulaan bahawa notis usul merupakan penyalahgunaan proses mahkamah kerana ia menimbulkan isu-isu yang sepatutnya dikemukakan pada perbicaraan petisyen. Pempetisyen juga menghujah bahawa prosiding penggulungan bukannya
C prosiding pelaksanaan atau tindakan untuk mendapatkan balik jumlah penghakiman dan oleh itu isu penghakiman asing tidak relevan kepada prosiding-prosiding ini. Isu utama yang perlu ditentukan oleh mahkamah ialah sama ada perkataan 'proceedings' dalam s 7 APSH termasuk penyampaian petisyen penggulungan.

D

Diputuskan, membatalkan petisyen dengan kos:

(1) Memandangkan mahkamah mempunyai kuasa untuk membatalkan
E petisyen penggulungan di bawah A 18 k 19 KMT dan di bawah kuasa sedia ada mahkamah di bawah A 92 k 4 KMT di mana petisyen tidak dapat dikekalkan atau merupakan penyalahgunaan proses mahkamah, bantahan permulaan pempetisyen bahawa permohonan responden merupakan penyalahgunaan proses sebagai isu yang sepatutnya
F dikemukakan pada perbicaraan petisyen tidak dapat dikekalkan (lihat perenggan 14).

(2) Petisyen dalam kes ini bermula dengan penghakiman ingkar yang diperoleh di Mahkamah Tinggi Singapura. Memandangkan Singapura
G merupakan negara salingan di bawah Jadual Pertama APSH, penghakiman tersebut perlu didaftarkan. Menurut s 7 APSH tiada prosiding untuk mendapatkan penghakiman asing akan dilayan sehingga pendaftaran penghakiman tersebut. Walau bagaimanapun, tidak terdapat keterangan menunjukkan bahawa pempetisyen telah
H mengambil langkah-langkah untuk mendaftarkan penghakiman Singapura di Malaysia. Oleh yang demikian, adalah penting untuk memastikan bahawa sama ada s 7 APSH boleh diguna pakai dalam kes ini dan hanya selepas itu penghakiman Singapura mesti didaftarkan (lihat perenggan 15 & 16).

I (3) Perkataan 'proceedings' didefinisikan dalam Kaedah-Kaedah (Penggulungan) Syarikat 1972, memandangkan prosiding-prosiding tersebut terdapat dalam penggulungan syarikat di bawah Akta dan prosiding-prosiding tersebut bermula apabila petisyen penggulungan disampaikan. Dalam kes ini petisyen dibuat melalui tuntutan statutori

untuk hutang penghakiman, prosiding penggulungan dibuat bagi mendapatkan hutang penghakiman tersebut. Walaupun ia bukannya satu penguatkuasaan dalam maksud A 45 KMT. Selanjutnya kuasa mahkamah untuk menyekat prosiding-prosiding di bawah s 176(10) Akta termasuk menyekat prosiding penggulungan. Oleh itu maksud perkataan 'proceedings' dalam s 7 APSH ialah tidak terhad dan termasuk prosiding-prosiding dalam apa-apa tindakan atau perkara termasuk prosiding penggulungan. Melalui APSH Parlimen bertujuan untuk memperuntukkan bahawa satu-satunya kaedah untuk menguatkuasakan penghakiman asing ialah melalui pendaftaran. Oleh itu dalam kes ini, pendaftaran penghakiman Singapura adalah diwajibkan dan tanpanya pempetisyen tidak mempunyai sebarang hak yang diperlukan untuk mengambil sebarang prosiding ke atas penghakiman tersebut. Dalam keadaan ini, petisyen tersebut adalah pramatang dan menyalahi undang-undang dan oleh itu merupakan penyalahgunaan proses (lihat perenggan 19, 21 – 22 & 25).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

For cases on winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6797–6805.

Cases referred to

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423, HC (refd)

Antara Elektrik Sdn Bhd lwn Bell & Order Bhd (dahulunya dikenali sebagai Bell & Order Sdn Bhd) [2000] 6 MLJ 385, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Boey Oi Leng v Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405, HC (refd)

Company, Re a (No 005685 of 1988); ex p Schwarcz (No 2) [1989] BCLC 427, ChD (refd)

Cheah Theam Swee, Re; ex p Equiticorp Finance Group Ltd & Anor [1996] 2 SLR 76, HC (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447; [1988] 1 CLJ 5 (Rep), SC (refd)

Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors [1998] 4 MLJ 86; [1998] 4 CLJ 526, HC (refd)

Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd [1997] 5 MLJ 377, HC (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1) [1998] 1 MLJ 99; [1998] 1 CLJ 285, CA (refd)

Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 MLJ 268; [1999] 4 CLJ 135, HC (refd)

Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276, HC (refd)
A Judgment Debtor (No 2176 of 1938), In re [1939] 1 Ch 601, CA (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49; [1988] 1 CLJ 618 (Rep), HC (refd)
Laxon & Co, In re [1892] 3 Ch 31, CA (refd)
Lim Szu Ang, Re; ex p Kewangan Utama Bhd [2005] 7 MLJ 487; [2005] 7 CLJ 23, HC (refd)
Lo Siong Fong, Re [1994] 2 MLJ 72, HC (refd)
Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 2 MLJ 98; [2000] 4 CLJ 437, CA (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & other appeals [2001] 4 MLJ 187, CA (refd)
NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd [2001] 6 MLJ 57, HC (refd)
PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21, HC (refd)
Raju Jayaraman Kerpaya, Re; ex p Associated Asian Securities (Pte) Ltd [1999] 5 CLJ 23, HC (refd)
Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd [2000] 3 MLJ 465; [2000] 7 CLJ 320, HC (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 303 (Rep), SC (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 CLJ 634, CA (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2009] 4 MLJ 358; [2009] 2 CLJ 242, CA (refd)
Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101; [1989] 2 CLJ 555 (Rep), HC (refd)
Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266; [1994] 3 CLJ 511, HC (refd)

Legislation referred to

Companies Act 1965 ss 176, 176(10), (10A), 218, 218(1)(e), 218(2)(a), (c), 219
Companies (Winding-Up) Rules 1972
Foreign Judgments (Reciprocal Enforcement) Act 1933 [UK] ss 2(2), 6
Reciprocal Enforcement of Commonwealth Judgments Act 1921 (Cap 264) [SG]
Reciprocal Enforcement of Judgments Act 1958 ss 4(2),(2)(b), 7, First Schedule
Rules of the High Court 1980 O 18 r 19, 19(1)(d), O 45, O 67, O 92 r 4

Wong Rhen Yen (Leslie Looi with him) (Dennis Nik & Wong) for the petitioner.
Wong Kim Fatt (Cheah Sin Chin with him) (Adnan Sundra & Low) for the respondent.

Vernon Ong JC:

[1] The petitioner, The Bank of East Asia Ltd, Singapore Branch presented a winding up petition against the respondent, Axis Incorporation Bhd under s 218 of the Companies Act 1965 ('the Act') on the ground that the respondent was unable to pay its debts. By a notice of motion (encl 29), the respondent is applying to strike out the petition.

BRIEF ACCOUNT OF THE FACTS

[2] The respondent is a public company listed in Bursa Malaysia with a paid up capital of RM152,906,791. On 21 November 2008, the petitioner obtained a judgment in default of appearance against the respondent for US$2,422,277.23 together with interest and costs in the High Court in the Republic of Singapore. The foreign judgment was not registered in Malaysia. On 2 December 2008, the petitioner issued a notice under s 218 of the Act against the respondent. On 2 January 2009, the petitioner presented a winding up petition against the respondent. On 19 February 2009, the petitioner obtained an ex parte order for the appointment of a provisional liquidator against the respondent. On 12 March 2009, the petitioner served the petition and the ex parte order on the respondent. On 18 March 2009, the respondent filed an application to set aside the ex parte order and to remove the provisional liquidator. On 7 April 2009, the court set aside the ex parte order. Meanwhile on 14 April 2009, the respondent obtained a restraining order under s 176(10) and (10A) of the Act at the KL High Court to restrain all further proceedings against the respondent for a period of nine months.

THE RESPONDENT'S SUBMISSION

[3] Learned counsel for the respondent submitted that a winding up petition may be struck out under O 18 r 19(1)(d) of the Rules of the High Court 1980 ('RHC') or under the inherent jurisdiction of the court under O 92 r 4 of the RHC (*Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; [1988] 1 CLJ 618 (Rep) at pp 619–621). Independent of the RHC, the power to strike out the winding up petition is also within the jurisdiction of the court (*Re Lo Siong Fong* [1994] 2 MLJ 72; *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86; [1998] 4 CLJ 526; *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99; [1998] 1 CLJ 285 (CA); *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 CLJ 634 (CA)).

[4] The petitioner had filed the petition in violation of the express statutory provisions of s 7 of the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). The petition is manifestly unsustainable and/or is an abuse of process and should be struck out forthwith in the interest of justice *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427 at p 430; *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377; *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423).

[5] Learned counsel also submitted in the judgment of this court of 7 April 2009 that the court set aside the ex parte order on the ground that the petitioner had failed to register the foreign judgment under the REJA. In view of the fact that the non-registration was fatal to the ex parte order, it must follow that the petition as it stands is wholly unsustainable and is an abuse of process and must be struck out.

[6] Learned counsel submitted that the petition is premised upon a Singaporean judgment which has not been registered under the REJA. The REJA applies to Singapore as it is a reciprocating country. The restriction under s 7 of the REJA means that bankruptcy proceedings could not issue upon a judgment of a reciprocating country (*Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23). Learned counsel also referred to the position in the United Kingdom in the case of *In re a Judgment Debtor (No 2176 of 1938)* [1939] 1 Ch 601. As no attempts have been made by the petitioner to register the foreign judgment in Malaysia, no proceedings for the recovery of a sum payable under a foreign judgment may be taken out in Malaysia.

[7] It was also submitted that s 7 of the REJA applies to all proceedings for the recovery of a sum payable under a foreign judgment. As the petition is made upon demand for a judgment debt, such winding up proceedings are made with a view of recovering the judgment debt. An analogy was drawn with bankruptcy proceedings (*Re Lim Szu Ang, ex p Kewangan Utama Bhd* [2005] 7 MLJ 487; [2005] 7 CLJ 23; *Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276). Accordingly, the petition as it stands is manifestly unsustainable and is an abuse of process of the court and must be struck out in the fact of the 7 April 2009 order of this court.

THE PETITIONER'S REPLY

[8] Learned counsel for the petitioner raised a preliminary objection contending that the respondent's notice of motion is an abuse of process of this court. The issues raised in this application should be raised at the hearing of the petition (*Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & other appeals* [2001] 4 MLJ 187; *Antara Elektrik Sdn Bhd lwn*

Bell & Order Bhd (dahulunya dikenali sebagai Bell & Order Sdn Bhd) [2000] 6 MLJ 385). This is not a plain and obvious case for the petition to be struck out (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465; [2000] 7 CLJ 320).

[9] It was also submitted that a winding up proceeding is not an execution proceeding or an action to recover a judgment sum. The issue of foreign judgment has no relevance to the winding up proceeding as it is not based on any judgment of a court. It is based on the respondent's inability to pay its debts as and when they fall due. There is no need to register the foreign judgment in Malaysia (*Maril-Rionebel*). The petition is based on s 218(1)(e) of the Act read with s 218(2)(a) and/or s 218(2)(c) where no judgment is required (*The Companies Act of Malaysia — An Annotation*, Woon, Walter and Hicks, Andrew; *Maril-Rionebel*; *Boey Oi Leng*; *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266; [1994] 3 CLJ 511; *Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101; [1989] 2 CLJ 555 (Rep); *Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 2 MLJ 98; [2000] 4 CLJ 437). The petition is based on a debt which is evidenced, inter alia, by a judgment of default obtained in the High Court of the Republic of Singapore and a certificate of indebtedness. It was also contended that the presumption of insolvency is raised as the respondent has not disputed the petitioner's s 281 notice. Accordingly, the burden has shifted on the respondent to rebut this presumption (*The Companies Act of Malaysia — An Annotation*, Woon, Walter and Hicks, Andrew at p 43; *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21; *NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd* [2001] 6 MLJ 57). Further, according to the respondent's quarterly report for the three month period ended in 30 September 2008 to BURSA, the respondent was and is unable to pay its debts (*Teck Yow Brothers Hand-Bag Trading Company*). In addition, the respondent has admitted to the debt. As a creditor, the petitioner has locus to present the winding up petition and no judgment is required. The respondent has failed to show that it has a substantial bona fide dispute of the debt (*Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; [1988] 1 CLJ 5 (Rep); *NCK Wire Products*). The test for winding up proceedings is the commercial insolvency test which is the respondent's

ability to pay its debts when it is due. It has been demonstrated that the respondent is unable to pay the said debt after failing to settle its debt within 21 days after service of the statutory demand (*Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 303 (Rep)). Finally, it was contended that the respondent is commercially insolvent as seen by their announcement to the BURSA Malaysia and the fact that the respondent is undertaking a debt restructuring exercise under s 176 of the Act.

FINDINGS OF THE COURT

[10] The petitioner's preliminary objection is that the respondent's application is an abuse of process and that the issues raised should be raised at the hearing of the petition. In *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49, the High Court struck out a winding up petition under O 18 r 19(1)(d) of the RHC and under the inherent jurisdiction of the court. In *Re Lo Siong Fong* [1994] 2 MLJ 72, the High Court held whilst that O 18 r 19 of the RHC per se has no application to a s 218 petition, there is, however, no doubt that the court has the inherent jurisdiction to strike out a petition for any abuse of its process.

[11] In *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86; [1998] 4 CLJ 526, the petitioners petitioned for the winding up of the first respondent company pursuant to s 218(1)(i) of the Act on the just and equitable ground. The second, third and fourth respondents filed a notice of motion for the petition to be struck out pursuant to and under the inherent jurisdiction of the court on the ground that it was an abuse of process of the court under O 92 r 4 of the RHC. In striking out the petition, Haidar Mohd Noor J (later CJ (Malaya)) said at p 98 (MLJ); p 537 (CLJ):

> The issue now is whether the court should exercise its discretionary power under its inherent jurisdiction to strike out the petition without a trial? In this respect I should perhaps bear in mind the cautionary words of Lord Templeton in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at pp 435–436:
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> > ... if an application to strike out involves a prolonged and serious arguments the judge, should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out will obviate the necessity for a trial or will subsequently reduce the burden of preparing for trial or the burden of the trial itself.
>
> I am satisfied that the second to the fourth respondents have shown that the petitioner's claims are manifestly unsustainable or an abuse of process and justice requires that the petition be struck out forthwith (see *Re Ringtower Holdings plc* [1989] 5 BCC 82 at p 84).

In the circumstances, I hereby strike out the petition with costs. A

[12] In *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99; [1998] 1 CLJ 285 (CA), the proposed interveners filed an application for leave to intervene in the appeal. As there was nothing in the Companies (Winding-Up) Rules 1972 permitting intervention the issue before the Court of Appeal was whether the RHC were irrelevant. If so, then the proposed intervener's application would be unsustainable. In this regard, Mahadev Shankar JCA said at p 307: B

> ... Consequently we think that where the Winding-up Rules make specific provision for a particular matter it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exist. If not it can always resort to O 92 r 4 of the RHC. C D

[13] In *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 CLJ 634, the Court of Appeal adopted the views expressed in *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268; [1999] 4 CLJ 135 of the undesirability to adopt a striking out procedure in a winding up petition since it could cause further delay rather than expedite the disposal of such matters. However, at p 647 Richard Malanjum JCA (now CJ (Sabah & Sarawak)) said: E

> We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view the use of that procedure in such winding up proceedings produces only delay in the adjudication of the matter. *Of course we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case O 18 r 19 could be resorted to.* (Emphasis added.) F G

[14] The principle that the court has the power under O 18 r 19 of the RHC to strike out a winding up petition was further restated by the Court of Appeal in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2009] 4 MLJ 358; [2009] 2 CLJ 242 at p 252 at the hearing of an appeal by the petitioner's against the decision of the High Court judge allowing the respondent's third application to strike out the petition. The line of authorities is clear as to the power of the court to strike out a winding up petition under O 18 r 19 of the RHC and under the inherent powers of the court under O 92 r 4 of the RHC where a petition is obviously unsustainable for want of cause of action or is plainly vexatious of frivolous or anabuse of process of court. The petitioner's preliminary objection that the respondent's application is an H I

abuse of process and that the issues raised should be raised at the hearing of the petition is unsustainable.

[15] Turning to the respondent's main ground. In the present case, the winding up petition is founded on a judgment in default obtained in the High Court in the Republic of Singapore. The REJA provides for the reciprocal enforcement of judgments of the reciprocating country of the original court. Under the First Schedule of the REJA, Singapore is a reciprocating country. Accordingly, the judgment in question is a judgment which can be registered. Pursuant to s 7 of the REJA, no proceedings for the recovery of a sum under the said judgment shall be entertained, other than by way of registration of the said judgment. Section 7 of the REJA provides as follows:

> 7 Judgments which can be registered not to be enforceable otherwise
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> No proceedings for the recovery of a sum payable under a judgment of a superior court, being a judgment to which this Part applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Malaysia.

[16] There is no evidence to show that the petitioner has taken any steps or made any attempts whatsoever to register the Singaporean judgment in Malaysia. Be that as it may, can it be said that the words 'proceedings for the recovery of a sum payable under a judgment' mean and include the winding up proceedings instituted against the respondent. If it does, then clearly the Singaporean judgment must be registered before the petitioner may take up proceedings for the recovery of the sum payable under the Singapore judgment.

[17] The issue to be determined is whether the word 'proceedings' in s 7 of the REJA includes the presentation of a winding up petition. In this regard, it is also pertinent to note the context of the word 'proceedings' in sub-s (2) of s 4 of the REJA which sets out the effect of registration of a judgment as follows:

> (2) Subject to the provisions of this Act with respect to the setting aside of registration:
>
> (a) a registered judgment shall, for the purposes of execution, be of the same force and effect;
>
> (b) *proceedings may be taken on a registered judgment;*
>
> (c) the sum for which a judgment is registered shall carry interest; and

(d) the registering court shall have the same control over the execution of a registered judgment,

as if the judgment had been a judgment originally given in the registering court and entered on the date of registration:

> Provided that execution shall not issue on the judgment so long as, under this Part and the rules of court made for the purposes thereof, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined. (Emphasis added.)

[18] In the case of *In re a Judgment Debtor (No 2176 of 1938)* [1939] 1 Ch 601, the Court of Appeal considered the import of s 6 and sub-s (2) of s 2 of the Foreign Judgments (Reciprocal Enforcement) Act 1933. Section 6 provides: 'No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom'. Subsection (2) of s 2 which provides for the effect of registration states: 'Subject to the provisions of this Act with respect to the setting aside of registration: (a) a registered judgment shall, for the purposes of execution, be of the same force and effect; and (b) proceedings may be taken on a registered judgment; and (c) the sum for which a judgment is registered shall carry interest; and (d) the registering court shall have the same control over the execution of a registered judgment; as if the judgment had been a judgment originally given in the registering court and entered on the date of registration'. The Court of Appeal said that Parliament was intending by the Act to provide that the only method of enforcing foreign judgments should be by registration. That being so, the holder of a registered judgment can do whatever s 2 tells him that he can do. In declining to read into the language by implication limiting words which would cut down its effect the Court of Appeal held that the word 'proceedings' quite clearly includes proceedings by way of bankruptcy proceedings initiated by a bankruptcy notice or otherwise. According to *Strouds Judicial Dictionary of Words And Phrases* (4th Ed) at p 2126 para (20), the word 'proceedings' has been defined to include a winding up petition. Similarly, in *In re Laxon & Co* [1892] 3 Ch 31, the Court of Appeal interpreted the word 'proceedings' to include a winding up petition on which no order has been made.

[19] In Malaysia, the word 'proceedings' is defined in the Companies (Winding-Up) Rules 1972 as the proceedings in the winding up of a company under the Act. Such proceedings commence upon the presentation of the winding

up petition (see s 219 of the Act). In the present case, as the petition is made upon a statutory demand for a judgment debt the winding up proceedings are made with the view of recovering the judgment debt. This is so even though it is not an enforcement within the meaning of O 45 of the Rules of the High Court 1980.

[20] The issue as to whether a bankruptcy proceeding is an enforcement of a judgment came up in *Lim Szu Ang, Re ex p Kewangan Utama Bhd* [2005] 7 MLJ 487; [2005] 7 CLJ 23. In that case, the bankruptcy notice and creditor's petition were set aside on the ground that the judgment upon which the debt was claimed was statute barred. At p 27, Abdul Aziz Rahim JC (now J) said:

> Thus in my view the bankruptcy proceeding is an action on a judgment but not an enforcement of the judgment within the meaning of O 45 r 1 of the RHC 1980. An action on a judgment is not the same as enforcing a judgment. In enforcing a judgment a party in whose favour the judgment is given is taking a proceeding against the adjudged party in order to force that other party to satisfy the terms of the judgment in accordance with the rules relating to the enforcement of judgments. But in an action on a judgment the party that obtained the judgment is not enforcing the judgment as understood under the rules. Instead the party concerned is exercising his rights arising from the judgment, and given to him under the rules or a written law, by a separate and distinct action or proceedings. However the outcome of such action or proceedings may result in the satisfaction of the judgment by the party against whom the judgment is obtained.
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> ... The word 'suit' is defined in s 2 of the Sarawak Ordinance as 'includes any action or proceedings'. To my mind, the definition is non-exhaustive and the term 'proceedings' may and could include bankruptcy proceedings.

[21] In the same manner, an analogy may be drawn with the meaning of 'proceedings' in s 176(10) of the Companies Act 1965. Under that provision, the power to restrain 'proceedings' includes a restraint on winding up proceedings. In *Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276, Abdul Malik Ishak J (now JCA) said at p 287:

> ... s 176(10) of the Companies Act 1965 allows an application to be made in order to 'restrain further proceedings' prior to the winding up where a 'compromise or arrangement has been proposed'. The court may be persuaded to adjourn a winding up petition if the company can show solid evidence that a rescue attempt is under way. The court's power to restrain proceedings is all encompassing. It extends to restraining the 'proceedings in any action or matter' (*Re Artistic Colour Printing Co* (1880) 14 Ch D 502 at pp 504–505).

[22] Accordingly, the court takes the view that the meaning of the word 'proceedings' in s 7 and sub-s (2)(b) of s 4 of the REJA is non-exhaustive and includes proceedings in any action or matter including winding up proceedings.

[23] In the present case, the right to take proceedings on the Singaporean judgment will only accrue to the petitioner upon the registration of the said judgment in Malaysia under the REJA. The registration of the Singaporean judgment is a fundamental prerequisite without which, the petitioner is devoid of the requisite right to take any proceedings on the judgment. In *Re Cheah Theam Swee, ex p Equiticorp Finance Group Ltd & Anor* [1996] 2 SLR 76, the judgment debtor applied to set aside a bankruptcy notice at the Singapore High Court. The bankruptcy notice was based on a judgment of the New Zealand High Court which had earlier been registered in the Singapore High Court under the Reciprocal Enforcement of Commonwealth Judgments Act 1921 (Cap 264). It was contended, inter alia, that a judgment obtained in a Commonwealth country and registered in accordance with the said act could not form the basis of a bankruptcy notice. The Singapore High Court ruled that a bankruptcy notice could be founded upon a judgment registered under the said Act.

[24] In *Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23 the judgment creditor obtained leave to register a judgment of the High Court of the Republic of Singapore. Pending the registration of the said judgment, the judgment creditor took out a bankruptcy notice against the judgment debtor. On the hearing of application by the judgment debtor, the bankruptcy notice was set aside by the senior assistant registrar. On appeal to the High Court, Abdul Hamid Mohamad J (later Chief Justice) found that the judgment creditor failed to comply with the procedure for the registration of the judgment as provided by O 67 of the RHC. The bankruptcy notice was consequently premature and void.

[25] In the present case, the petition is founded on the Singaporean judgment (see para 6 of petition). The petition was made upon a demand for a judgment debt under the Singaporean judgment (see s 218 of the notice). In the premises, the winding up proceedings are made with the view of recovering the said judgment debt. In order for such proceedings to be validly instituted, the Singaporean judgment must be registered in Malaysia. The winding up petition fell far short of the mandatory requirements of the REJA in that the petitioner did not even obtain an order for leave to register the Singaporean judgment. In the circumstances, the winding up petition is

premature and bad in law. A winding up petition which is bad in law is also an abuse of process and it cannot be entertained. For the foregoing reasons the petition is struck out with costs.

Petition struck out with costs.

Reported by Kohila Nesan